(1)

Supreme Court, U.S.
F I L E D

No. 95-1307 OCT 19 1995

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1995

RUSSELL PERRY,

Petitioner,

v.

RONALD LEWTER,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

C. MICHAEL SEIBERT
Counsel of Record
4802 Westwood Drive
Huntsville, AL 35810
(205) 852-3592
(205) 859-0002 FAX

46pp

QUESTIONS PRESENTED

1. Whether Lewter's SLAPP against Perry clearly has a chilling effect upon the free exercise of the First Amendment right to petition the government for redress of grievances by the citizens of Alabama.

2. Whether Perry was denied due process and equal protection of the law under the 5th and 14th Amendments by the receipt of campaign contributions from opposing counsel to sitting members of the Alabama Supreme Court while the case was pending before these same justices, failure to grant recusal motion on this issue, failure to write an opinion on a case of first impression in the State of Alabama and the failure to disclose to counsel the fact of those contributions.

LIST OF ALL PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceedings below:

1. **RUSSELL PERRY**, Defendant/Appellant/Petitioner;

and

2. **RONALD LEWTER**, Plaintiff/Appellee/Respondent.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF ALL PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vi

Cases vi

Constitutional Provisions vii

Statutes viii

Rules viii

Other Authorities viii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 4

STATEMENT OF THE FACTS 6

ARGUMENT

1. Lewter's SLAPP against Perry clearly has a chilling effect upon the free exercise of the First Amendment

right to petition the government for redress of grievances by the citizens of Alabama 11

2. Perry was denied due process and equal protection of the law under the 5th and 14th Amendments by the receipt of campaign contributions from opposing counsel to sitting members of the Alabama Supreme Court while the case was pending before these same justices, failure to grant recusal motion on this issue, failure to write an opinion on a case of first impression in the State of Alabama and the failure to disclose to counsel the fact of those contributions 19

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813, 106 S.Ct. 580, 89 L.Ed.2d 823 (1986) . . 23, 24

Ex parte Melof,
553 So.2d 554 (Ala. 1989) 22

Green Oil v. Hornsby,
539 So.2d 218 (Ala. 1989) 14

Hammond v. City of Gadsden,
493 So.2d 374 (Ala. 1986) 14, 16

Humphries v. Lynch,
579 So.2d 612 (Ala. 1991) 20

In re Murchison,
349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955) 23

Parker v. Connors Steel Co.,
855 F.2d 1510 (11th Cir. 1988) 22

Tumey v. Ohio,
273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) 23

Ward v. Village of Monroeville,
409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) 23

Constitutional Provisions

ALA. CONST., art. I, § 13 11

ALA. CONST., art. I, § 25 12

ALA. CONST., amend. 328, § 6.19 22

U.S. CONST., amend. I 2, 11, 12, 18, 24

U.S. CONST., amend. V 2, 11, 17, 19

U.S. CONST., amend. XIV . . . . . i, 2, 11, 17, 19

Statutes

ALA. CODE §§ 10-2A-70 through 10-2A-70.2 (1975) 21

ALA. CODE § 10-11-3 (1975) 3, 14, 15

ALA. CODE § 12-1-12 (1975). 3, 22

ALA. CODE § 13A-9-51 (1975) 3, 10

28 U.S.C. § 1257 . . . . . 1, 6

Rules

ALA.R.CIV.P. 56 13

Other Authorities

Canons of Judicial Ethics, Canon 1 22

Canons of Judicial Ethics, Canon 2 22

Canons of Judicial Ethics, Canon 3 . . . . . 20, 22

Canons of Judicial Ethics, Canon 6 22

3 W. Blackstone, *Commentaries* 361 . . . . . 22, 23

OPINIONS BELOW

The Alabama Supreme Court order affirmed the judgment below, without opinion, on May 26, 1995. The order, which is not to be published, is set out at Appendix A. The Alabama Supreme Court order denied Petitioner's Motion for Rehearing *en banc*, without opinion, on July 21,1995. The order, which is not to be published, is set out at Appendix B.

All relevant memorandum decisions issued by the trial court, both during and after trial, appear in Appendix C.

JURISDICTION

The opinion of the Alabama Supreme Court in this cause was entered on May 26, 1995. A timely petition for rehearing with petition for rehearing *en banc* was denied on July 20, 1995.

This Court has jurisdiction to review the judgment under 28 U.S.C. § 1257.

STATUTES INVOLVED

The pertinent portions of constitutional and statutory provisions involved in this case are as follows:

1. *First Amendment to the United States Constitution:*

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

2. *Fifth Amendment to the United States Constitution:*

> No person shall ... be deprived of life, liberty, or property, without due process of law ...

3. *Fourteenth Amendment, § 1 to the United States Constitution:*

> No state shall ... deprive any person of life, liberty, or property, without due process of law; nor to deny to any person within its jurisdiction the equal protection of the laws.

4. *ALA. CODE § 10-11-3 (1975, as amended)*:

Any non-compensated officer of a qualified entity shall be immune from suit and not subject to civil liability arising from conduct of the affairs of such qualified entity except where the act or omission of such officer, which gives rise to a cause of action, amounts to willful or wanton misconduct or fraud, or gross negligence.

5. *ALA. CODE § 12-1-12 (1975, as amended)*:

No judge of any court shall sit in any case or proceeding in which he is interested or related to any party within the fourth degree of consanguinity or affinity or in which he has been of counsel or in which is called in question the validity of any judgment or judicial proceeding in which he was of counsel or the validity or construction of any instrument or paper prepared or signed by him as counsel or attorney, without the consent of the parties entered of record or put in writing if the court is not of record.

6. *ALA. CODE § 13A-9-51 (1975,as amended)*:

(a) A person commits the crime of misapplication of property if, with knowledge that he is misapplying and that the misapplication involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted, he misapplies or disposes of property that has been entrusted to him as

a fiduciary or that is property of the government or a financial institution.

STATEMENT OF THE CASE

The SLAPP serving as the basis of the matter being brought before this Honorable Court was filed by LEWTER on June 24, 1991 in Limestone County Circuit Court, Limestone County, Alabama. In Limestone County Circuit Court Case No. CV 91-231 LEWTER charged PERRY with three counts: (1) malicious prosecution of LEWTER, charging him with willful neglect of official duty or malfeasance in office; (2) malicious prosecution of LEWTER, charging him with misappropriation of public funds; and (3) intentional interference with business or contractual relations. (C. 14-19).

On February 7, 1994, the civil action finally went to trial before a Limestone County jury. (C. 7). On February 9, 1994, the case went to the jury and a verdict was returned against PERRY in the following amounts: Seventy-five Thousand Dollars ($75,000.00) in compensatory damages and One Hundred Thousand Dollars ($100,000.00) in punitive damages. (C. 7, 200).

On March 11, 1994, PERRY filed numerous post-trial motions in the Circuit Court, including: (1) Motion for Directed Verdict (C. 194-198); (2) Motion for Remittitur (C.203-204); (3) Motion for Stay of Execution Pending Ruling on Post-trial Motions (C. 207-208); (4) Motion to Review Amount of Damage Awards (C. 205-206); and (5) Motion for Judgment Notwithstanding the Verdict or, in the alternative, for a New Trial.(C. 209-230, and amended C. 259-261). On April 13, 1994, Judge Blizzard denied PERRY'S Motion to Supplement the transcript to include opening statements, voir dire and closing statements, holding that no objections were made during voir dire and the court reporter did not take down either opening or closing arguments. (C. 263-264). The trial court then held a hearing on all other post-trial motions on June 3, 1994, at which time all such motions were summarily denied. (C. 278-280).

On June 14, 1994, PERRY filed Notice of Appeal to the Alabama Supreme Court and, per trial court order, posted a supersedeas bond with the court in the amount of Two Hundred Eighteen Thousand Seven Hundred Fifty Dollars and no Cents ($218,750.00). (C. 282).

On May 26, 1995, the Alabama Supreme Court affirmed the trial court decision without opinion. In response, on June 9, 1995, PERRY

filed a Motion to Reconsider with the Alabama Supreme Court as well as a Motion that the justices who received campaign contributions from counsel for LEWTER while the case was pending before the Court should recuse themselves. The Alabama Supreme Court denied both such motions, again without written opinion on July 21, 1995. Having exhausted all state avenues of recourse, PERRY now appeals to this Honorable Court pursuant to 28 U.S.C. § 1257.

STATEMENT OF FACTS

On or about the 30th day of April, 1990, citizens of Limestone County formed a non-profit corporation, Concerned Citizens of Limestone County, Inc., for the purposes of:(1)resisting the placement of a proposed solid waste landfill site near their residences; and (2) resisting local government corruption occurring in Limestone County, Alabama. The Petitioner, RUSSELL PERRY (herinafter referred to as "PERRY"), was named as President of this civic group. The Concerned Citizens quickly became an effective organized force in successfully blocking the Limestone County Landfill through actively supporting political candidates who more responsive to the general public and who promoted honest government.

RONALD LEWTER (hereinafter referred to as "LEWTER"), the Respondent, was a foreman under several different county commissioners and had a reputation within Limestone County District 3 for doing work on behalf of various commissioners that could have been construed as illegal. LEWTER was expected at the time of the events underlying this cause to run against his boss, Walter McGlocklin, in the Limestone County Commission race for the District 3 county seat. LEWTER had also been reprimanded numerous times for refusing to take *any* instructions from the District 3 Commissioner, Walter McGlocklin.

On or about the 21st day of February, 1991, PERRY observed LEWTER grading a private drive and supplying or spreading gravel on the private drive of Mr. Reynolds, a Limestone County resident. PERRY reported to the Committee for the Concerned Citizens what he had observed. The Committee voted that PERRY should request an investigation of the matter by Limestone County authorities. However, he ran into the local political machine that the Committee had been formed to resist and was even told by the Limestone County District Attorney's office that they would issue *no* warrant against LEWTER based upon PERRY'S claims.

Mr. Charles Page, the Limestone County Circuit Court Clerk who

was also acting as the County Magistrate, initially refused to issue the warrant against LEWTER as requested by PERRY. PERRY had previously written the Alabama Attorney General's Office concerning the problems in Limestone County and its County commissioners, specifically requesting information regarding state statutes that govern conduct such as that he had witnessed LEWTER perform. The Attorney General's Office sent several opinions of five or six different attorney generals [R. 69], wherein certain laws were cited. PERRY, based upon his own observations and the Attorney General's opinions in his possession, believed that the law governing *public employees* had been violated by LEWTER. PERRY then went to the Magistrate Charles Page, presenting Page the information he had obtained from both the Alabama Ethics Commission and the Alabama Attorney General's Office.

In his attempt to stop the continuation of bad government, PERRY, acting as President of the Concerned Citizens, Inc., formally requested that a complaint be issued and that LEWTER come in and respond to that complaint. Mr. Page initially refused PERRY'S request. Shortly thereafter, Page contacted PERRY at home and told him to come down to the Courthouse and Page would issue a warrant. Page represented to PERRY that he had changed his mind because he, Page, had sought counsel on the matter and believed that PERRY had sufficient legal grounds under Alabama law to have a warrant issued against

LEWTER.

Mysteriously and totally absent any request or information given to the newspapers by PERRY, a newspaper reporter, Frank Brock, appeared at the Courthouse, the location where PERRY was summoned by Mr. Page. [C. 219-230]. The reporter attempted to cover the story even before a warrant had been issued. PERRY requested that the reporter leave, as it was at that point not a public matter. PERRY also expressed that he did not wish to embarrass LEWTER, but that he merely wished to stop what he perceived as LEWTER'S frequent misconduct. Relying on Mr. Page's expertise as a Magistrate[C. 223], and believing that the correct laws had been applied by the Magistrate, PERRY signed the complaint under the statutes, which PERRY had been assured to have enforcement effect. Apparently, without shepardizing or cross-referencing the statutes, Mr. Page elected to issued the warrant (in lieu of a summons) for the arrest of LEWTER.

LEWTER at that time retained Hon. Jimmy Alexander of the Athens, Alabama law firm of Alexander, Corder & Plunk. At the initial criminal Court appearance, counsel for LEWTER had the Limestone County District Court dismiss the case as being under a repealed statute, and the Court *never reached the merits* of the case against LEWTER. Within an hour of the dismissal, and without the Limestone County

District Attorney's Office making any effort whatsoever to transfer the case to the proper statute under ALA. CODE § 13A-9-51 (1975, as amended), LEWTER'S counsel, Jimmy Alexander, filed a lawsuit against PERRY for alleged "malicious prosecution" under the repealed statute.

The media then became tabloid sensationalist on the side of LEWTER, claiming that LEWTER had been arrested for "illegal" spreading of dirt, not for malfeasance in office or misuse of public funds. The reporter Frank Brock, who then worked for the *Athens News-Courier* and who was responsible for most, if not all, of the press coverage in this matter, shortly thereafter obtained a lucrative job with Waste Management Inc., the company that had initially proposed the regional dump site that the Concerned Citizens were predominantly formed to oppose.

This lawsuit, unexpounded but properly characterized as a SLAPP suit by PERRY'S then counsel, [SR 31], ensued against PERRY'S actions taken out of concern as the President of the Concerned Citizens, Inc.

ARGUMENT

1. Lewter's SLAPP against Perry clearly has a chilling effect upon the free exercise of the First Amendment right to petition the government for redress of grievances by the citizens of Alabama.

This case is clearly indicative of a trend of abuse of civil lawsuits or counterclaims filed against individuals, such as PERRY, for having communicated his or her views to government decision makers on any issue of public concern. By the refusal of the Alabama Appellate Courts to address the unconstitutional effects of such actions, Alabama citizens will be afraid to reform potential political misconduct for fear of being civilly liable for exercising their First Amendment right to petition the government. Furthermore, the actions of both the trial court and Alabama Supreme Court also deter the rights of Alabama citizens to be free from corrupt government and officials as well as the right of Alabama citizens to seek the enforcement of the criminal laws against public officials and employees. PERRY has clearly been denied his due process and equal protection rights under U.S. CONST. amend. V and XIV, as well as ALA. CONST. Art. I, § 13 (1901, as amended) in this matter.

The type of action underlying this cause, commonly referred as a "Strategic Lawsuit Against Political Participation" [or SLAPP],

involves a politically active citizen, PERRY, who witnessed what he perceived to be an illegal act by a Limestone County government employee, LEWTER. PERRY reported the facts as he saw them to a non-profit corporation, the Concerned Citizens of Limestone County, Inc., who, in furthering the advancement of good government, authorized PERRY to seek available legal redress on their behalf for LEWTER'S apparent violation of the law.

Pursuant to the authorization granted by Concerned Citizens, PERRY reported what he witnessed to numerous lawfully constituted government authorities, including the Limestone County Sheriff's Department, the Limestone County District Attorney's Office, the Alabama Ethics Commission, the Alabama Attorney General's Office, and the Warrant Magistrate of Limestone County. By doing so, PERRY clearly made application "... to those invested with the power of government for the purposes of redress of grievances or other purposes" to rectify LEWTER'S apparent violation of the law. ALA. CONST. art. I, § 25 (1901, as amended); U.S. CONST. amend. I. However, no government body approached by PERRY concerning this matter was willing or able to correct the situation. As a result, PERRY felt that he had no choice but to pursue legal means against LEWTER personally, pursuant to the authority granted him by Concerned Citizens, Inc.

In reliance on information obtained by PERRY from knowledgeable governmental sources, including the Alabama Attorney General's office and the Alabama Ethics Commission, as well as in reliance on the assurances given to him by the Limestone County Warrant Magistrate that a warrant would not issue unless the Magistrate was convinced that sufficient legal grounds for such a warrant existed, PERRY sought redress for LEWTER'S apparent violation of the law.

Rather than achieving the goal of cleaning up the government, PERRY suddenly found himself, on the same day that the criminal charges against LEWTER were dismissed, the subject of a massive lawsuit for the "malicious prosecution" of LEWTER. The matter then took over two years to reach the trial stage, during which time PERRY suffered crippling financial hardship in defending himself against LEWTER'S SLAPP.

During the prolonged period between commencement of the civil action by LEWTER and trial, PERRY filed a Motion For Summary Judgment, pursuant to ALA.R.CIV.P. 56. In support of this motion, PERRY filed a supporting affidavit as well as portions of LEWTER'S deposition in which LEWTER admitted having performed the acts that PERRY claimed to have witnessed and which served as the basis for the criminal action. However, the trial court took no action on this motion.

Finally, the matter went before a Limestone County jury panel on February 7, 1994. After an emotionally charged trial containing numerous instances of misconduct by both counsel for LEWTER (such as improper argumentation, *see discussion below*) and by the Limestone County Circuit Court (such as the failure to charge the jury on the issue of PERRY'S immunity from civil liability under ALA. CODE § 10-11-3), PERRY suffered a One Hundred and Seventy-Five Thousand Dollar ($175,000.00) judgment being rendered against him as a citizen seeking good government.

After being burdened with this excessive and clearly disproportionate judgment, PERRY sought relief from the trial court, asking that the flawed jury verdict be set aside because the verdict included a sum which was totally unsupported by the evidence and the verdict resulted from bias, passion, corruption or other improper motive, pursuant to the principles enunciated by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So.2d 374 (Ala. 1986) and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989). However, the trial court aggravated the entire matter by denying any semblance of due process as required by *Hammond*, *Green Oil*, and both the United States and Alabama Constitutions, for such hearings.

First, at the *Hammond* hearing PERRY was not allowed to testify

as to his intent as it related to the issue of his alleged culpability (R. 397-400, 415-421, 442-444), even though this issue is one of many factors which the court must review in the proceeding. This issue is also important in that PERRY'S immunity under ALA. CODE § 10-11-3 would only become negated if LEWTER had specifically proven at trial that PERRY had acted in a willful or wanton manner, fraudulently or was grossly negligent in his actions.

Second, the trial court would not allow PERRY the opportunity to call Charles Page, the Limestone County Warrant Magistrate, to testify concerning his duties and representations which he made to PERRY concerning the legality of the warrant. (R. 355-356, 388-390). This testimony would have been vital to show that PERRY did not have the malice required to support the jury verdict.

Third, the trial court did not allow PERRY to call LEWTER as a witness on the issues of proof of attorney's fees allegedly paid in defense of the criminal prosecution (a claimed amount of $3500) nor on the issue of LEWTER'S past criminal record, issues which in Alabama bear a significant impact on the amount of compensatory and punitive damages awarded by the jury. (R. 357-358, 388-393).

Fourth, the trial court not only refused to consider the improper

and highly inflammatory closing arguments made by counsel for LEWTER at trial, but Judge Blizzard physically left the bench, instructing PERRY'S counsel to "... read the matters into the record" because he "... was not going to consider them." (R. 313-319, App. D-1). The judge acted in this manner despite the fact that improper closing argument is another factor that the trial court must consider when determining whether or not a jury verdict is flawed. *Hammond*, supra.

Fifth, the trial court did not make LEWTER present evidence as to any "damages" he might have suffered as a result of PERRY'S actions. In fact, the only "damage" claims made by LEWTER was his testimony that he "worried, lost sleep and felt shame, embarrassment and humiliation about being arrested." (R. 137-138).

And, finally, the trial court, through granting LEWTER'S pre-trial Motion in Limine and allowing such limitations to apply in the *Hammond* hearing as well, prevented PERRY from going into such pertinent issues as: (1) LEWTER'S prior arrests and convictions; (2) prior acts of and accusations of LEWTER performing illegal work on private property with county equipment, materials and labor; (3) LEWTER being drunk on the job while operating bulldozers and other heavy machinery; (4) LEWTER'S prior poor job performance, ratings and reviews by the previous County Commissioner; and (5) other matters

which would have served to limit any damages allegedly suffered by LEWTER. As a result, PERRY not only was punished for exercising his First Amendment right to petition the government, but he was also clearly denied his Fifth and Fourteenth Amendment rights of a fair trial pursuant to due process of law.

Furthermore, this case has already had a pronounced impact upon innocent third parties. Affidavits of members of the Concerned Citizens of Limestone County, Inc., were presented at the post-trial motion hearing before the trial court. (R. 363). These affidavits stated that the lawsuit and judgment had a chilling effect on their willingness to participate in local government or bring to the attention of government authorities acts that they perceive to be illegal. (C. 270-277). Furthermore, since the verdict in this cause LEWTER has filed suit against Alan Leff, Vice-President of Concerned Citizens. In the subsequent action LEWTER claims that pictures Leff took of LEWTER performing work of questionable legality is "an invasion of privacy." Thus, it becomes quite apparent the ultimate thrust of the SLAPP campaign being conducted by LEWTER.

On May 26, 1995, almost one year since the matter was appealed, the Alabama Supreme Court chose to exacerbate an already bad situation by affirming the lower court judgment, without issuing an opinion on the

pertinent issues as well as taxing appellate costs against PERRY. By failing or refusing to address the important constitutional questions at issue in the case, the Alabama Supreme Court chose to reward those who abuse the judicial process for political purposes and to slam the door against the unfettered exercise of the First Amendment by Alabama citizens.

On June 9, 1995, counsel for PERRY filed a Motion to Reconsider with the Alabama Supreme Court, asking that body to address the constitutional problems at issue with LEWTER'S SLAPP against PERRY. Counsel further noted the possible constitutional problems over certain justices receiving campaign contributions from counsel for LEWTER and other members of the law firm of Alexander, Corder, Plunk & Baker, P.C.,the firm representing LEWTER, during the period that the case was pending before the Supreme Court. [*see discussion below*]. Once again, the Alabama Supreme Court chose to summarily deny PERRY'S motion without addressing a single constitutional issue underlying the cause.

2. Whether Perry was denied due process and equal protection of the law under the Fifth and Fourteenth Amendments by the receipt of campaign contributions from opposing counsel to sitting members of the Alabama Supreme Court while the case was pending before these same justices, failure to grant recusal motion on this issue, failure to write an opinion on a case of first impression in the State of Alabama and the failure to disclose to counsel the fact of those contributions.

On June 9, 1995, Petitioner moved for the recusal of any Alabama Justice who had accepted campaign contributions from the law firm of Alexander, Corder & Plunk, the successor firm of Alexander, Plunk, Corder & Baker, P.C., Jimmy E. Alexander or any of the other members of his law firm.

Within forty-eight hours prior to filing the Motion for Recusal on June 9, 1995, counsel for Petitioner had learned that the following members, and perhaps others, of the Alabama Supreme Court had accepted campaign contributions from the law firm or the individual members thereof representing Respondent as represented in the following table:

ALABAMA JUSTICE	POLITICAL CAMPAIGN CONTRIBUTOR	AMOUNT CONTRIBUTED
Shores	Alexander, Corder & Plunk	$ 2,500.00
Houston	Alexander, Corder & Plunk	$ 500.00
Kennedy	Alexander, Corder, Plunk & Baker	$ 1,500.00
Cook	Jimmy E. Alexander	$ 800.00
	Alexander, Corder, Plunk & Baker	$ 500.00
	Alexander, Corder, Plunk & Baker, P.C.	$ 1,000.00
	Alexander, Corder, Plunk & Baker, P.C.	$ 449.00
Almon	Jimmy E. Alexander	$ 833.34
	James M. Corder	$ 833.33
	John Plunk	$ 833.33
	TOTAL	$ 9,749.00

When factors arise in an action, whether at trial or at the appellate level, such that it is reasonable for a party or members of the public or counsel to question the impartiality of one or more judges, recusal of that judge or group of judges is required. *Canons of Judicial Ethics*, Canon 3, Subdivision c(1). *Humphries v. Lynch*, 579 So.2d 612 (Ala. 1991).

It is reasonable for PERRY, counsel for PERRY and members of the public to question the impartiality of any Alabama judge or justice who has received campaign contributions from counsel for LEWTER, particularly in light of the following factors:

1. The fact of the acceptance of campaign contributions by five Alabama justices from LEWTER'S counsel was not disclosed to PERRY'S counsel by either the Alabama Supreme Court or by counsel for LEWTER.

2. The Notice of Appeal in this case was filed with the Alabama Supreme Court on June 14, 1994. Contributions totalling Two Thousand Nine Hundred and Forty-nine Dollars ($ 2,949.00) were made to Alabama Justices Kennedy and Cook (both of whom participated in the Alabama Supreme Court decision of May 26, 1995 as well as the denial of the rehearing motion on July 21, 1995) by counsel for LEWTER during the period PERRY'S appeal was pending before the Alabama Supreme Court.

3. Two of the contributions made by the law firm of Alexander, Corder, Plunk & Baker, P.C., to Justices Kennedy and Cook during the pendency of this appeal appear to be in violation of Alabama law. ALA. CODE §§ 10-2A-70 through 10-2A-70.2 (1975, as amended).

4. The Alabama Supreme Court apparently failed or refused to take notice of the intense public interest during the 1994 election of Alabama Supreme Court Justices concerning the issue of campaign contributions by lawyers and law firms to candidates for, or a Justice of, the Alabama Supreme Court while that lawyer or law firm has cases pending on appeal before the court.

Disqualification of judges and justices in Alabama is governed by a number of sources. ALA. CONST. amend. 328, § 6.19; *Canons of Judicial Ethics*, Canons 3(c) and 6; ALA. CODE § 12-1-12 (1975, as amended); *Ex parte Melof*, 553 So.2d 554 (Ala. 1989). Not only must these "black-letter" rules of law be observed, but the judge's decision whether or not to recuse himself or herself should also be informed by principles of fairness, fair play, full disclosure, avoidance of the appearance of impropriety, and the upholding of the integrity and independence of the judiciary. *Canons of Judicial Ethics*, Canons 1 and 2.

Inherent in all these rules and principles that a judge be recused if his or her impartiality is questioned, is the principle that our system of justice must not only do justice, but must satisfy the appearance of justice. *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988). A judge is sworn to administer impartial justice and his "... authority greatly

depends upon that presumption and that idea." 3 W. Blackstone, *Commentaries* 361.

It is a violation of the Fifth and Fourteenth Amendments of the United States Constitution "... to subject [a person's] liberty or property to the judgment of a Court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822, 106 S.Ct. 580, 89 L.Ed.2d 823 (1986). See also *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). But, the degree or kind of interest is sufficient in a particular case to disqualify a judge from sitting cannot be defined with precision. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). This Court has also held that a judge should be disqualified and recuse himself if the situation is one which would offer a possible temptation to the average judge to lead him not to hold the balance "... nice, clear and true." *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83, 34 L.Ed.2d 267 (1972).

As Justice Brennan's concurring opinion in *Lavoie* makes clear, however, a judge's interest that is "direct, personal, substantial and pecuniary" is not the only test for disqualification and recusal. *Lavoie* at 1589. Non-pecuniary interests have also been found to require recusal as a matter of due process. Ibid. An interest is also "... sufficiently 'direct'

if the outcome of the challenged proceeding substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually obtained in that proceeding." Ibid.

Fairness, due process, avoidance of impropriety, and most particularly the avoidance of the appearance of impropriety mandated the recusal of each of the Alabama Justices who received campaign contributions from either Jimmy Alexander or the law firm of Alexander, Corder, Plunk & Baker, P.C., counsel for LEWTER. As the Alabama Supreme Court failed to do so, *without written opinion on the issue*, it is obvious that PERRY has been denied a full and fair adjudication on this issue and, as a result, denied his constitutional right of due process under the Fifth and Fourteenth Amendments.

CONCLUSION

This case involves issues which remain hotly disputed both in the State and Federal court systems. Extremely important Constitutional rights are at stake.

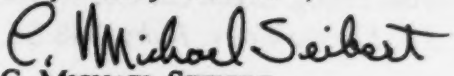
The Petition Clause of the First Amendment is one of our oldest and most fundamental civil rights, guaranteeing and encouraging citizen involvement in the political arena at all levels. It is inconceivable that the

Founding Fathers meant for this right to be brazenly subverted through misuse of the judicial process.

Furthermore, the fact that three of the Alabama justices who directly participated in rendering the decisions against PERRY received campaign contributions from counsel for LEWTER gives an appearance of impropriety which taints the decisions rendered by the Alabama Supreme Court. The Alabama Supreme Court also actively aggravated the appearance of impropriety by its refusal to address the issue even though counsel for PERRY timely brought the matter before that court. Given that the Alabama Supreme Court had the possible taint of impropriety in this matter, its failure to even address the matter clearly violates PERRY'S constitutionally guaranteed right of due process under the law.

Accordingly, this Court should grant certiorari.

Respectfully submitted,



C. MICHAEL SEIBERT
Counsel of Record
4802 Westwood Drive
Hunstville, AL 35810
(205) 852-3592

Attorney for Russell Perry

STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE SUPREME COURT
OCTOBER TERM, 1994-95

(Released May 26, 1995)

1931297

Russell S. Perry v. Ronald Lewter
Appeal from Limestone Circuit Court (CV 91-231)

SHORES, JUSTICE.

AFFIRMED. NO OPINION.

See Rule 53 (a)(1) and (a)(2)(B), Ala. R. App. P.; *Westbrook v. Gibbs*, 285 Ala. 223, 231 So.2d 97, 103 (1970); *T.R. Miller Mill Co. v. Ralls*, 280 Ala. 253, 192 So.2d 706, 716 (1966); *Robbins v. Voigt*, 280 Ala. 207, 191 So.2d 212 (1966); *Gleichert v. Stephens*, 291 Ala. 347, 280 So.2d 776, 777 (1973); *Stokes v. Long-Lewis Ford, Inc.*, 549 So.2d 51, 52 (Ala. 1989); *Merrell v. Joe Bullard Oldsmobile, Inc.*, 529 So.2d 943, 946 (Ala. 1988); *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986); *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989); and *S.S. Kresge Co. v. Ruby*, 348 So.2d 484, 487 (Ala. 1977).

Maddox, Houston, Kennedy, and Cook, JJ., concur.

IN THE SUPREME COURT OF ALABAMA
July 21, 1995

1931297

Russell S. Perry v. Ronald Lewter. (Limestone: CV 91-231)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

SHORES, J. - Maddox, Houston, Kennedy and Cook, JJ., concur.

IN THE CIRCUIT COURT FOR LIMESTONE COUNTY, ALABAMA

RONALD LEWTER,

PLAINTIFF,

vs. CIVIL ACTION NO. CV 91-231J

RUSSELL S. PERRY,

DEFENDANT.

ORDER

(Released June 3, 1994)

The Defendant's Motion for a New Trial or in the Alternative for a Judgment Nothwithstanding the Verdict and for Remittitur was submitted upon testimony taken ore tenus and arguments of the attorneys.

The jury in this case returned a verdict in favor of the Plaintiff and against the Defendant in the amount of $75,000.00 compensatory damages and $100,000.00 punitive damages. The complaint was based upon malicious prosecution. It was not disputed that the Defendant swore out a warrant for the Plaintiff's arrest and that the charge was dismissed in the District Court of Limestone County, Alabama.

The Defendant has alleged juror misconduct. Four jurors testified. There is no evidence of juror misconduct. It was not shown by the evidence that any juror visited the scene of the incident. The testimony of one juror was that one juror who could not be identified had said that he had visited the scene. There is no evidence as to who this juror was or

what his conduct might have consisted of. There was no evidence that any juror commented about an investigation at the scene or his conclusions. Any such alleged conduct, even if it existed, is not shown to have influenced the verdict in this case.

Testimony was taken on the issue of the effect of the verdict on the Defendant, his family, his finances. The Defendant is shown by the evidence to have a considerable estate and earns a high income. The Court, having considered the Defendant's culpability and the impact as presented from the evidence on the parties, finds that the verdict is supported by the evidence. The verdict was not based upon passion, corruption or improper motive, and that the award is not excessive as a matter of law based upon the evidence presented to the Court.

The Court finds from the evidence that the alleged errors at trial, which are alleged in the motion, as amended, and which have each been consisdered by the Court, are not error and that the trial was free of error that would support a new trial.

A trial judge is not to substitute his judgment on the facts for that of the jury.

The Court observed the entire jury venire as well as the final jurors who actually heard the evidence in this case and the Court finds that they appeared to be conscientious and went about their duties in a serious and proper manner. There were seasoned and competent trial counsel on both sides. The jury recognized the seriousness of the issues presented and it appears to the Court that the Defendant received a fair and impartial trial before the jury.

The amount of a civil fine is largely left to the discretion of the jury. The Constitution allows juries to fix punitive damages. The record established the culpability of the Defendant and the evidence established clearly that the Defendant's conduct was intentional. The Court further

finds that the impact upon the Defendant is not excessive. No evidence was presented regarding the impact of the verdict upon the Plaintiff. So, therefore, the Court finds that no grounds exist for setting aside the verdict on the basis of the impact on the Plaintiff. The Court has also considered the desirability to discouraging others from similar misconduct and finds the jury award is not excessive. The Court has considered the compensatory damages in this case and finds that they too are supported by the evidence.

The Court finds that the jury award of damages is not the result of bias, passion, corruption or improper motives. The Court further finds that the punitive damages awarded in this case are not excessive as against the Defendant, Russell S. Perry. The Court further finds that there is no evidence to support a new trial or a judgment notwithstanding the verdict, or a remittitur.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the Defendant's Motion for a New Trial or in the Alternative for a Judgment Notwithstanding the Verdict be and the same are hereby denied.

Dated this 3rd day of June, 1994.

/s/ Henry W. Blizzard
Circuit Judge

IN THE CIRCUIT COURT FOR LIMESTONE COUNTY, ALABAMA

RONALD LEWTER,

PLAINTIFF,

vs. CIVIL ACTION NO. CV 91-231

RUSSELL S. PERRY,

DEFENDANT.

ORDER
(Released April 12, 1994)

Came the Defendant and moved to have the Court order that the transcript which has heretofore been furnished to the parties be supplemented to include opening statements, closing statements, and voir dire. The Court finds that there were no objections by either party during voir dire, the opening and closing statments, and that the opening and closing statements were not taken down by the Court Reporter, but were electronically recorded, and it appearing that no objection having been made to the voir dire, the opening and closing statements, that there is nothing within these matters which can be considered by the Court on the pending motions.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the Motion to Supplementthe Record is, therefore, denied.

The Defendant offers evidence in Court of juror misconduct. On Motion of the Defendant, this matter and the Motions for Remittitur and for Judgment Notwithstanding the Verdict or for New Trial are hereby continued to be reset.

The Defendant's Motion for a Stay of Execution on the Judgment is hereby granted on the condition that the Defendant file a supersedeas bond, and that the Defendant is allowed ten (10) days to file the supersedeas bond.

Dated this 12th day of April, 1994.

/s/ Henry W. Blizzard
Circuit Judge

RECORD ON PREJUDICIAL NATURE OF OPENING AND CLOSING STATEMENTS

* * * * *

(*Court Transcript*, pp. 312-319)

MR RYAN: Your Honor, before -- can we get into -- you asked me about what statements were made that I claimed are prejudicial such that they would require a new trial or judgment notwithstanding the verdict --

THE COURT: Well, were they objected to?

MR. RYAN: No, Your Honor, they were not.

THE COURT: Well, I will not consider them if they were not objected to at the trial.

MR. RYAN: Can we make an offer of proof in that regard, Your Honor?

THE COURT: All right.

MR. RYAN: Thank you.

THE COURT: But I'm not going to consider them, and I'll be back in just a minute. You tell me when you've read them on the record because I'm not going to be a party to that.

(Whereupon the following was had and done of record outside the presence of the Court)

MR. RYAN: All right. During the opening part of the closing arguments by Mr. Baker at trial he vouched for the credibility of a virtual

witness, Jimmy Fry, the District Attorney of Limestone County, by referring to him as Mr. Law Enforcement in Limestone County.

MR. ALEXANDER: We're going to object to the recitation by the present counsel for the Defendant as to what was said, what he claims was said in a closing statement as not being the best evidence. The attorney was not there, and we'll make a continuing objection to his hearsay statement, and we do specifically object to any statements by the Defendant's counsel on the grounds of hearsay. It is not the best evidence.

MR. RYAN: If your objection is to the best evidence, would you join me then in asking that the closing arguments of yourself and Mr. Baker be transcribed by the court reporter at our expense?

MR. ALEXANDER: You've contacted the Court repeatedly on this matter without consulting me --

MR. RYAN: No, sir, I have not, and I will not stand here and listen to any further --

MR. ALEXANDER: I'm not going to ask the court reporter to do anything.

MR. RYAN: Okay. May I continue, please?

MR. ALEXANDER: Not -- with the understanding we have our continuing objection.

MR. BAKER: Address the Court and not us. Make your record.

MR. RYAN: The Court is not here.

MR. BAKER: Make your record.

MR. ALEXANDER: I do not respond to you.

MR. RYAN: I would like to point out, if it's notobvious from the record, the Judge is not even in the courtroom at this time, and it is required that he consider these matters for the purposes of bias and prejudice.

Going on, as I understand it, there was a motion in limine granted by the trial court that was filed by the Plaintiff had requested -- or that the order stated that no prior acts of the Plaintiff could be gone into by counsel for the Defendant and that Plaintiffs expressly waived any claim for damage to reputation during Mr. Baker's closing argument. He stated that he had stolen something from Mr. Lewter, your peace of mind, your ability to hold your head up. We contend that that is damage to reputation. He also expressly stated a little bit later on in his argument that Mr. Lewter had been publically [*sic*] humiliated. If that's not a claim for damage to reputation, I don't know what is. He later stated shortly after that that he and his family will have to live with the stigma this man has put on him. That's another reference to the reputation claims that were expressly waived and ordered by the Court not to be gone into.

During Mr. Alexander's closing argument to the jury, he again vouched -- well, not he again, but he also vouched for the credibility of a virtual witness, Jimmy Fry, the District Attorney of Limestone County. Mr. Alexander stated quote there's no better District Attorney in the State of Alabama end quote.

Mr. Alexander later stated in his argument in referring to Mr. Perry that Mr. Perry was guilty of quote sleazy, slimy conduct end quote as an argument and an attack on the witness that was not warranted by the evidence. It was prejudicial and inflammatory and should not have been allowed.

Mr. Alexander later repeated and continued references to quote

the working man of Limestone County end quote. Code words or an apparent reference to the lack of wealth or poverty of Mr. Lewter. He also made references to Mr. Perry's quote political agenda end quote. We maintain that there was no evidence in the record to support that and that that was also improper and inflammatory and prejudicial and impaired the substantial rights of the Defendant.

Mr. Alexander further stated in his closing arguments by vouching again for a witness in this case, Mr. Lewter, and also injected a personal belief about Mr. Lewter's apparent mental operation or good faith in grading the driveway in question. Mr. Alexander stated quote when I worked for the highway department in the fifties and sixties I didn't know where the right of way was and I may have gotten off of it end quote. We maintain that's vouching for the creditability of Mr. Lewter, the Plaintiff, and was improper and should have been disallowed on the Court's own motion even in the absence of an objection. It was imflammatory and prejudicial to the Defendant's substantial rights.

Again, Mr. Alexander made reference to Mr. Perry having, quote his own political agenda, end quote, and also stated, quote you don't go into the work place and try to have your own agenda, end quote.

All of these statements by counsel we feel they individually or in some [*sic*] total adversely and substantially affected the substantial rights of the Defendant even in the absence of an objection. It impaired Mr. Perry's ability to have a fair trial. The Court should have on its own motion sustained or made some comment to the jury to disregard those comments and polled the jury to find out if they could have disregarded those comments and rendered substantial justice in the case without consideration of all of those comments separately and severally.

MR. ALEXANDER: We would like to let the record that there were no objections made whatsoever by the Defendant nor by the Defendant's attorney of record who tried the case to any of the matters which the

Defendant now seeks to object to.

MR. RYAN: Well, as I stated before, I was not trial counsel for Mr. Perry at the time this trial was had and conducted, and I was not present and I did not know at the time what transpired. We don't have a transcript of those proceedings; and therefore, I can't really respond to what Mr. Alexander had to say about them.

THE COURT: Okay. Have you got them in the record, then?

MR. RYAN: We are finished with the --

THE COURT: Opening and closing?

MR. RYAN: Yes, sir. We're finished with that area of it.

* * * * *